89- 1491

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

RAYMOND J. HUGHES, JR.,

Petitioner,

vs.

JOHN BUSS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

JAMES E. DOYLE, JR.
214 West Mifflin Street
Madison, Wisconsin 53703-2594
(608) 256-9031

Counsel for Petitioner

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QUESTIONS PRESENTED

1. May a federal court of appeals ignore a defendant's admission in his answer that he was acting under color of state law?

2. In the determination of whether a state official was acting under color of state law, should the sole deciding factor be whether a private citizen, not acting under color of state law, could have performed the same act?

LIST OF PARTIES

The parties to the proceedings below were the petitioner Raymond Hughes, his brother Ronald Hughes, the respondent John Buss, and Dale Meyer and Robert Combs. Petitioner Raymond Hughes appealed from the District Court's order in favor of the three defendants below, and petitioner Raymond Hughes seeks review of the Court of Appeals decision only with respect to respondent John Buss.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

Cases:

Miscellaneous:

No. _____

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OPINIONS BELOW

The opinion of the Court of Appeals for the Seventh Circuit is reported at 880 F.2d. 967, and is reprinted in the appendix hereto, p. A-1, infra. The order of the Court of Appeals denying the petition for rehearing is also reprinted in the appendix, p. A-13, infra.

The memorandum decision of the United States District Court for the Western District of Wisconsin (Crabb, D.J.) has

not been reported. It is reprinted in the appendix, p. A-14, infra.

JURISDICTION

Petitioner brought suit in the Western District of Wisconsin under the federal jurisdiction of 42 U.S.C. Section 1983. The court granted defendants' motions for summary judgment with respect to petitioner's federal claim, and declined to exercise pendent jurisdiction over the state law claims.

On appeal, the Seventh Circuit entered a judgment on July 27, 1989, affirming the judgment of the District Court. Petitioner filed a petition for rehearing on August 16, 1989, which was denied on January 10, 1990 without explanation.

The jurisdiction of this Court to review the judgment of the Seventh Circuit is invoked under 28 U.S.C. Section 1254(1).

STATUTES INVOLVED

42 U.S.C. Section 1983. Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in any action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

28 U.S.C. Section 1254. Court of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree...

STATEMENT OF THE CASE

Raymond J. Hughes, Jr. and his brother, Ronald Hughes, brought suit in federal district court pursuant to 42 U.S.C. Section 1983 against a Wisconsin Department of Natural Resources (DNR) conservation warden and two Sauk County, Wisconsin, deputy sheriffs. The Hughes brothers alleged that the defendants violated their rights under the Fourth and Fourteenth Amendments to the United States Constitution by arresting them for false imprisonment without probable cause. The brothers also brought state claims for false arrest and trespass against the conservation warden, John Buss. The district court granted defendants' motions for summary judgment as to the federal claims on the ground that the defendants were protected by qualified immunity. The court declined to exercise jurisdiction over the petitioner's pendent state law claims. Raymond Hughes appealed from the orders of the district court.

The petitioner Raymond J. Hughes, Jr. is a part owner of approximately 160 acres of land in Sauk County, Wisconsin. (Docket No. 24, pp. 7, 14.) Sunday, November 30, 1986 was the final day of the deer hunting season. (Docket No. 37, p. 10.) On that day at approximately 2:15 p.m., the petitioner Raymond Hughes, together with his brother Ronald Hughes, entered upon their land for the purpose of hunting deer. (Docket No.25, pp. 22, 24, 27.) When they arrived at their

land, they found that a chain which normally was across the field road running through their property had been lowered, the road was very muddy, and there were deeply grooved truck tracks in the road. (Docket No. 24, pp. 15-16). The road had not been muddy and the chain had been up when Ronald Hughes left the land the previous night. (Docket No. 24, pp. 15-16.) Because the road was so muddy the petitioner Raymond Hughes and his brother drove only a short distance onto their land. (Docket No.2 4, p. 17, Ex. 2.)

The petitioner Raymond Hughes and his brother got out of the truck and began walking with their rifles over their shoulders for the purpose of going hunting. (Docket No. 24, pp. 17, 18, 24; Docket No. 25, p. 5; Docket No. 68, par. 3; Docket No. 69, par. 3.) After walking a short distance, Raymond Hughes observed a truck moving across their property. (Docket No. 25, p. 5, Ex. 3; Docket No. 24, pp. 18-19, Ex. 2; Docket No. 68, par. 3; Docket No. 69, par. 3.) When first seen, the truck was approximately 800 yards away and was moving in the direction of the petitioner and his brother. (Docket No. 24, pp. 19-21.) As it moved across the property, the truck went into the hay fields. (Docket No. 24, pp. 19-21.)

The truck approached the position of the petitioner and his brother. It was not marked with any official markings. (Docket No. 37, p. 64.) As the truck approached the petitioner and his brother, the truck had difficulty climbing a grade on the muddy road. (Docket No. 37, p. 39; Docket No. 24, pp. 22-23.) It went off the road by as much as twenty feet so that it could proceed. (Docket No. 24, p. 23.) The shoulders of the road were flat. (Docket No. 37, p. 39.) The truck would have been able to pass the petitioner's truck. (Docket No. 68, par. 4; Docket No. 69, par. 4; Docket No. 37, p. 49; Docket No. 25, p. 27.) The driver of the truck could have simply accelerated and left. (Docket No. 25, p. 27.)

The driver of the truck was the defendant John Buss. (Docket No. 37, p. 9.) The defendant Buss was a conservation warden for the Wisconsin Department of Natural Resources (DNR). (Docket No. 37, p. 3.) He stopped the truck near the

petitioner and his brother. (Docket No. 68, par. 4; Docket No. 69, par. 4.) The defendant Buss was unaware of any signal by the petitioner, or his brother, seeking to have the truck stop. (Docket No. 37, p. 40.) He stopped the truck because he had difficulty climbing the grade. (Docket No. 37, p. 40.)

There was a woman in the unmarked truck with the defendant Buss. (Docket No. 37, pp. 9, 11; Docket No. 38, pp. 4, 8-10.) The woman was not a DNR employee; she was the defendant's wife, Victoria Buss. (Docket No. 37, p. 11; Docket No. 38, pp. 4-6.) Victoria Buss had been deer hunting on that day, before being picked up by her husband. (Docket No. 38, pp. 4-5.) She had not gotten her allotted deer during the deer season that was to end on that day. (Docket No. 38, p. 46.) There were two untagged deer in the back of the defendant Buss' pickup truck. (Docket No. 37, p. 13; Docket No. 24, p. 37.) There was an uncased shotgun in the driver's compartment of the truck. (Docket No. 24, p. 37.)

After stopping his truck, the defendant Buss did not get out of it. (Docket No. 24, p. 25.) While the defendant was in the truck, neither the petitioner nor his brother observed any insignia on the defendant Buss' clothes indicating that he was a game warden. (Docket No. 24, p. 33; Docket No. 25, p. 12.) The petitioner's brother, Ronald Hughes, was upset; he stated to the defendant Buss that he was trespassing. (Docket No. 24, pp. 25-26; Docket No. 25, p. 10.) The defendant Buss briefly showed the petitioner's brother his identification, but then pulled it away without letting the petitioner's brother see it. (Docket No. 24, p. 26; Docket No. 37, p. 44.) The petitioner's brother asked the petitioner to call the Sauk County Sheriff's Department. (Docket No. 24, p. 39; Docket No. 25, p. 20.) The defendant Buss was aware that the petitioner was contacting the Sheriff's Department. (Docket No. 37, p. 49.)

The petitioner and his brother had their deer rifles slung over their shoulders. (Docket No. 68, par. 3; Docket No. 69, par. 3.) The petitioner's brother's rifle never moved from this position, slung over his shoulder, during the entire incident.

(Docket No. 24, p. 24; Docket No. 68, par. 5.) The petitioner kept his rifle slung over his shoulder when he was at the defendant Buss' truck. (Docket No. 69, par. 5.)

The petitioner walked away from the defendant Buss' truck to his own truck to contact the Sheriff's Department. (Docket No. 69, par. 5.) At his truck, the petitioner laid his gun on the ground. (Docket No. 69, par. 5.) He called his brother's wife, asking her to contact the Sheriff's Department. (Docket No. 25, p. 21.) The first call to the Sheriff's Department about this incident came from the Hugheses. (Docket No. 467, p. 5.)

After making the call, the petitioner returned to the defendant Buss' truck. (Docket No. 69, par. 5.) He returned to inform his brother that he was going hunting. (Docket No. 69, par. 5.) When he returned to the defendant Buss' truck, he heard the defendant Buss say to his brother, "So you are holding me here against my will." The petitioner Raymond Hughes grabbed his stomach and laughed, saying "No, that's not what he said. That's what you'd like for him to say, but that's not what he said." (Docket No. 25, p. 25.) The petitioner wrote down the license number and color of the truck. (Docket No. 25, pp. 20-22.) The petitioner wanted to go hunting. (Docket No. 69, par. 5.) Soon after making the call to Mrs. Hughes in order to contact the Sheriff's Department, the petitioner carefully, in an exaggerated manner, so that the defendant Buss would see, unloaded his rifle. (Docket No. 25, p. 23; Docket No. 69, par. 5.) He cased the rifle, got into his truck and drove to another part of his property to go hunting. (Docket No. 25, p. 23; Docket No. 69, par. 5.)

At no time in his contact with the defendant Buss, did the petitioner have his rifle off his shoulder, except to lay it on the ground, unload it and case it. (Docket No. 69, par. 6.) At no time did his brother have his gun off his shoulder. (Docket No. 24, p. 24; Docket No. 68, par. 5.) At no time did the petitioner, or his brother, make any threatening gestures toward the defendant Buss or Victoria Buss. (Docket No. 68, par. 7; Docket No. 69, par. 6.) At no time did the petitioner or his

brother stand in front of the defendant Buss' truck, preventing it from moving. (Docket No. 68, par. 8; Docket No. 69, par. 8.) At no time did the petitioner or his brother tell John Buss or Victoria Buss that they could not leave the property. (Docket No. 68, par. 9; Docket No. 69, par. 9.)

The petitioner Raymond Hughes went off hunting on his property. His brother remained at the defendant Buss' truck. (Docket No. 37, pp. 55-56; Docket No. 38, p. 31.) While the petitioner was away, his brother and the defendant Buss continued to converse. At one point while the petitioner was away, the defendant Buss suggested to Ronald Hughes that they leave the property to go to the road to meet his superior officers whom he had asked to come to the scene. Ronald Hughes responded, "No way, we're not going to the road." When the defendant Buss asked what Ronald Hughes would do if he drove out to the road, Ronald Hughes replied, "We'll have to see." (Docket No. 24, pp. 42-43; Docket No. 37, p. 54.)

While the petitioner was still off hunting on another part of the property, other DNR wardens and a Village of Spring Green police officer arrived at the scene. (Docket No. 39, pp. 8, 12; Docket No. 44, pp. 14, 22-23.) The petitioner went back to the defendant Buss' truck after the other law enforcement officers had arrived. He stood quietly to the side while the officers spoke with his brother. (Docket No. 25, p. 34; Docket No. 39, pp. 12-13; Docket No. 44, p. 23.) The law enforcement officers then decided to take the discussion to the road at the entrance to the property. (Docket No. 43, p. 15.) The petitioner drove his truck, with his brother, to the road. The DNR wardens, the Spring Green Officer, John Buss and Victoria Buss drove in Buss' truck to the road. (Docket No. 43, p. 15.)

At the road the petitioner stood to the side while various law enforcement officers spoke to the petitioner's brother and to themselves. (Docket No. 41, p. 20.) After some time at the road, the petitioner was arrested by the defendant Robert Combs, a Sauk County Sheriff's Department deputy, for false imprisonment. (Docket No. 45, pp. 39-40.) The time

of the arrest was shortly after 3:30 p.m. (Docket No. 45, pp. 13, 25-29.) The petitioner was transported to the Sauk County Jail in Baraboo where he was held until his release on bail the following day at 3:45 p.m. (Docket No. 20.) He remained under the conditions of bail until December 17, 1986, when the district attorney declined to initiate criminal prosecution. (Docket No. 20, letter from District Attorney.)

The defendants Dale Meyer and Robert Combs, Sauk County Sheriff's Department deputies, were dispatched to the petitioner's land in response to the calls from both Mrs. Hughes and the defendant Buss. (Docket No. 45, pp. 8-10; Docket No. 46, pp. 4-6.) When Buss and the others moved from the petitioner's land to the adjacent road, he spoke to the defendants Meyer and Combs for about ten minutes. (Docket No. 45, pp. 25-29.) Buss told Meyer and Combs that he was on the Hughes property in his personal vehicle with his wife; that Ronald and Raymond Hughes approached him and asked him what he was doing there; that Ronald and Raymond Hughes were upset with him (especially Ronald Hughes). (Docket No. 45, pp. 37-38.) Buss told Meyer and Combs that the Hugheses had rifles and he was fearful that they would shoot. (Docket No. 45, pp. 37, 38.) Buss said that Raymond Hughes and Ronald Hughes stood in front of his vehicle, preventing him from leaving. (Docket No. 45, pp. 38-39.) He said that when he asked "Mr. Hughes" (unspecified as to which "Mr. Hughes") what would happen if he didn't stay, that "Hughes" (again unspecified) said, "Wait and you'll have to see." (Docket No. 45, p. 39.) He indicated that the petitioner Raymond Hughes was present when this statement was made. (Docket No. 45, pp. 45-46.) The defendant Buss also told the defendants Meyer and Combs that Ronald Hughes asked him to contact his superior. (Docket No. 45, p. 31.) He may have told them that the petitioner Raymond Hughes had made a call to the Sheriff's Department and wrote down the license of the truck. (Docket No. 45, pp. 32, 33, 34.) The defendant Buss told them that the petitioner Raymond Hughes had a rifle the entire time of the incident.

(Docket No. 45, p. 36.) He did not tell them that the petitioner Raymond Hughes unloaded his gun, got in the truck and drove away. (Docket No. 45, p. 36.) At the end of the conversation among the defendants, the defendant Meyer said to the defendant Buss, "This is false imprisonment." (Docket No. 37, p. 67.) Meyer and Combs had a brief discussion about the charge. The defendant Combs then arrested both Ronald Hughes and the petitioner Raymond Hughes for false imprisonment. (Docket No. 45, pp. 39-40.) The defendant Buss was on the scene when the petitioner Raymond Hughes was arrested. (Docket No. 38, p. 34.)

Hughes's federal claim against Buss was that Buss violated his Fourth Amendment right to freedom from unreasonable seizure.

In his complaint, the petitioner alleged:

> "6. Defendant John Potts [Defendant Buss was originally misnamed John Potts, but later, by stipulation, correctly named] is an individual whose current address is unknown. At all times pertinent to this Complaint he was employed as a warden by the Department of Natural Resources of the State of Wisconsin and, in his contact with the plaintiffs as described in this Complaint, he was acting under color of state law."

(Docket No. 2.)

To that allegation, the defendant Buss answered:

> "6. DENY IN PART. The defendants admit that Conservation Warden John Buss was involved in the incident that gave rise to this lawsuit and further admit that Warden Buss was, at all times material to this action, acting within the scope of his employment and under color of state law. The defendants deny all other allegations of paragraph 6."

(Docket No. 9.)

The Court of Appeals affirmed the district court's grant of summary judgment as to defendant Buss, but not for the

reasons the district court gave. Rather, the Court of Appeals held that because Buss was not acting under color of state law when he provided Officers Meyer and Combs with information, Buss could not be held liable under Section 1983. That issue had not been briefed or argued in either the District Court or the Court of Appeals; it had been decided at the pleading stage of the case by Buss himself.

Petitioner, pointing out that the issue of color of state law had been decided at the pleading stage, petitioned the Court of Appeals for a rehearing on August 16, 1989. That petition was denied, without explanation, on January 10, 1990.

REASONS FOR GRANTING THE WRIT

I. THE APPELLATE COURT'S DISREGARD OF THE RECORD — OF RESPONDENT'S ADMISSION THAT HE WAS ACTING UNDER COLOR OF STATE LAW — DEPARTS FROM THE ACCEPTED AND USUAL COURSE OF PROCEEDINGS.

It is axiomatic that a defendant is bound by the admissions he makes in answer to a complaint, until the defendant amends his answer. Freedom National Bank v. Northern Illinois Corp., 202 F.2d 601, 605 (7th Cir. 1953); Romero Reyes v. Marine Enterprises, Inc., 494 F.2d 866, 868 (1st Cir. 1974). It is also axiomatic that the court is bound by the defendant's admission. PPX Enterprises, Inc. v. Audiofidelity, Inc., 746 F.2d 120, 123 (2nd Cir. 1984); Brown v. Tennessee Gas Pipeline Co., 623 F.2d 450, 454 (6th Cir. 1980). This is the accepted and usual course of proceedings in our judicial system, and is so for good reason.

Such principles are in keeping with the basic philosophy of the Federal Rules of Civil Procedure: "to secure the just, speedy and inexpensive determination of every action." Rule 1. To this end, the rules have been fashioned to reduce the

importance of the element of surprise, of the booby-trap, of sandbagging. A defendant may not suddenly change the issues being litigated at the last moment just on a whim. Nor should a court be allowed to do so. By an answer to a complaint, a defendant is telling the other party — and the court — the allegations in issue. A defendant chooses to some extent the grounds on which to fight. To allow the defendant to suddenly change an admission at the last minute would require an extraordinary showing, if the admission, as here, was a key element in the petitioner's case.

The Court of Appeals in this case has — with no notice or explanation — departed from this course. It has unfairly disregarded the record in this case — defendant's admission in the answer that defendant was acting under color of state law — to base its decision with respect to this defendant on an issue that had not been briefed or argued at any stage of the case.

Even after a petition for rehearing had been filed, pointing out to the Court of Appeals defendant's admission settling the issue of color of state law, the court did not feel itself bound by defendant's pleading. The petition for rehearing was denied without explanation. Petitioner's right of reliance on defendant's admission was unfairly denied.

This course of judicial conduct does not promote the just, speedy, or inexpensive determination of lawsuits. It is a course of conduct that ignores the ground rules by which all courts and parties are bound, that promotes the taking of appeals and consequent delay, and that imposes costs on all parties and this Court in trying to get the error corrected. This Court should correct this error in the Court of Appeals and send the reassuring message that the rules of civil procedure do indeed mean what they say.

II. THE COURT OF APPEALS DECISION UNDERMINES THE CONCEPT OF COLOR OF STATE LAW.

A. Defendant Had To Admit He Was Acting Under Color Of State Law — The Facts Compelled Him To Admit It.

Respondent Buss had good grounds for admitting his actions were under color of state law. He was acting under color of law.[1]

Buss justified his unlawful entry onto the petitioner's property on the basis that he was a warden investigating possible game violations. Upon meeting the petitioner on the property, Buss immediately identified himself as a warden, and put out a radio transmission over the law enforcement radio frequency for "back-up."

Law enforcement officers responded to the scene based on Buss' call for "back-up." After the arrival of Meyer and Combs, Buss acted, and was treated, as a fellow law enforcement officer. Meyer and Combs took only his side of the story. Unlike the usual situation in which a landowner is complaining of a trespass, Meyer and Combs made no attempt to determine the position of the landowners. Deputies Meyer and Combs justified their decision to accept the defendant Buss' version on the grounds that he was a fellow law enforcement officer; the District Court relied on that fact as well. (Appendix, p. A-23, infra.) After Buss related his version of events, Deputies Meyer and Combs discussed with him whether these facts constituted a crime and arrested the petitioner in Buss' presence. This conduct on the part of the defendant Buss was carried out, and was understood by

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[1]This Court need not address whether Buss was acting under color of state law. That issue, of course, has been precluded by defendant's admission. It has furthermore never been addressed by the courts below. However, the following section of this petition is included on the possibility that the Court may decide to address the issue.

others to have been carried out, in the course of his duties as a state conservation warden. The defendant so admitted in his Answer.

This case is distinguishable from Norton v. Liddel, 620 F.2d 1375 (10th Cir. 1980), upon which the Court of Appeals relied. First, there was no admission by the defendant in Norton that he was acting under color of state law. Second, the petitioner in Norton complained of the issuance of an Information, not of an arrest. The issuance of an Information is a prosecutorial, and not a police, function. It is unclear what role the Sheriff was alleged to have played in the prosecutor's decision to issue the charge. He apparently provided some information. The petitioner in this case complains of an arrest made at the scene by law enforcement officers. While defendant Buss may not have made the arrest himself, his involvement was much greater than simply providing some information to a prosecutor days later. He was a central figure in the events that formed the basis of the arrest. He called for the "back-up" of other officers. When they arrived, he told them his version of what happened. He heard, without comment, the other officers' view that what he had told them constituted false imprisonment. He stood by as they arrested the petitioner. Under these facts, a reasonable fact-finder could conclude that the defendant Buss' conduct was a substantial factor in the petitioner's arrest. So far from being analogous to the facts of Norton, this case presents a classic abuse of power by a state official under color of state law.

The Court of Appeals, however, stated that:

> Buss's acts of describing his encounter with the Hughes brothers was functionally equivalent to that of any private citizen reporting to the police the details of an alleged criminal act. His status as a DNR official did not clothe him with greater authority to make statements to the police about the occurrence than any other citizen would possess. (Appendix, p. A-9–A-10, infra.)

The question is not whether Buss had greater authority than a private citizen to do what he did; the question is whether Buss used his official authority to do what he did.

"It is the nature of the act performed...which determines whether the officer has acted under color of law." Stengel v. Belcher, 522 F.2d 438 (6th Cir. 1975).

B. Prior Decisions Of This Court Have Rejected The Court Of Appeals Analysis Which Focuses Solely On Whether A Private Citizen Could Have Performed The Same Act As Buss Did.

By focusing on "functional equivalents" and on what could have happened (a private citizen could have reported the alleged crime instead of Buss), the Court of Appeals now substitutes for analysis of the facts of this case an analysis of possibilities, in order to exculpate Buss. This analysis will not escape the attention of civil rights defense attorneys. If the analysis is not repudiated, one can easily imagine where it will lead: the police officer beating the suspect...isn't he the "functional equivalent" of the private bully? Couldn't the beating have been just as easily administered by a private citizen?

This hypothetical example is not far-fetched. It is not far-fetched if John Buss, in this factual situation, was not acting under color of state law because he could have reported the occurrence as a private citizen. That has not been the law:

> If an individual is possessed of state authority and purports to act under that authority, his action is state action. It is irrelevant that he might have taken the same action had he acted in a purely private capacity or that the particular action which he took was not authorized by state law.

Griffin v. Maryland, 378 U.S. 130, 135, 84 S.Ct. 1770, 1773, 12 L.E.2d 754 (1964) (emphasis added).

The Griffin analysis has recently been cited with approval

by this Court in West v. Atkins, 487 U.S. ____, 108 S.Ct. 2250, 2259 n. 15, 101 L.E.2d 40 (1988):

> the fact that a state employee's role parallels one in the private sector is not, by itself, reason to conclude that the former is not acting under color of state law in performing his duties. [Quotation from Griffin omitted.]

The decision of the Court of Appeals thus presents a real danger: that the entire concept of "color of state law" will be undermined, and the protection that 42 U.S.C. Sec. 1983 affords us will be undermined along with it.

There is another threat to the protection of Section 1983 which is implicit in the decision of the Court of Appeals. Under this decision a law enforcement officer, though as entangled in the events leading to an arrest as the defendant Buss, is not subject to liability under 42 U.S.C. Sec. 1983 if he only provides information (even false information) to an arresting officer. Further, as in this case, an arresting officer can invoke the defense of good faith immunity by relying on the representations of a fellow law enforcement officer. Therefore, officers can insulate themselves by making sure that the officer involved in the incident does not make the arrest, but merely provides information to the arresting officer.

CONCLUSION

For the reasons stated above, this petition for certiorari should be granted. The decision of the Court of Appeals with respect to John Buss should be reversed and the case remanded.

Respectfully submitted,

March ____, 1990

JAMES E. DOYLE, JR.
214 West Mifflin Street
Madison, Wisconsin 53703-2594

Counsel for Petitioner

APPENDIX

PAGE

In the

United States Court of Appeals

For the Seventh Circuit

No. 88-2761

RAYMOND J. HUGHES, JR.,

Plaintiff-Appellant,

v.

DALE MEYER, JOHN BUSS and ROBERT COMBS,

Defendants-Appellees.

Appeal from the United States District Court
for the Western District of Wisconsin.
No. 87 C 864—**Barbara B. Crabb**, *Judge.*

ARGUED MARCH 27, 1988—DECIDED JULY 27, 1989

Before BAUER, *Chief Judge*, KANNE, *Circuit Judge*, and HENLEY, *Senior Circuit Judge.**

HENLEY, *Senior Circuit Judge.* Raymond J. Hughes, Jr. and his brother, Ronald Hughes, brought suit in federal district court pursuant to 42 U.S.C. § 1983 against two Sauk County, Wisconsin, deputy sheriffs and a Wisconsin Department of Natural Resources (DNR) conser-

* The Honorable J. Smith Henley, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

vation warden. The Hughes brothers alleged that the defendants violated their rights under the fourth amendment to the United States Constitution by arresting them for false imprisonment without probable cause. The brothers also named the conservation warden as a defendant in pendent state claims for false arrest and trespass. The district court granted defendants' motions for summary judgment as to the federal claims on the ground that the defendants were protected by qualified immunity. Having dismissed the federal claims, that court declined to exercise jurisdiction over the plaintiffs' pendent state law claims. Only Raymond Hughes appeals from the orders of the district court. We affirm.

The Hughes brothers own one-hundred-sixty acres of vacant land in Sauk County, Wisconsin. On the final day of the 1987 deer-hunting season, the brothers went to their land for the purpose of hunting deer. There they observed someone driving a truck on their property. The truck went into the hay fields on the land because it was having difficulty climbing a grade on the muddy road and may have gone off the road by as much as twenty feet. The occupants of the truck were defendant-appellee John Buss, who is a conservation warden of the DNR, and his wife Victoria Buss. The truck bore no official DNR markings. The warden and his wife had two untagged deer carcasses and at least Mrs. Buss may have been deer hunting earlier that day. Ronald asked the Busses why they were on the land and accused them of trespassing. Buss identified himself as a game warden and stated that he was investigating complaints of illegal hunting. In response to a request from Ronald, Buss produced identification. Ronald was infuriated with Buss because of his belief that Buss was trespassing. His conversation was aggressive, and, according to the district court, he was "boisterous, loud and upset." According to Buss, one or both of the brothers accused another DNR officer of having contributed to the death of their father.

Buss radioed for assistance from the Sauk County Sheriff's Department and the DNR. Ronald asked Raymond

to call the police on the brothers' radio and Raymond complied. Raymond returned to the Buss truck in response to his brother's request to witness that "this fella's getting belligerent with me." Ronald then told Raymond, "this guy is a real smart aleck and I want you to get down some of the things he said on paper." Raymond went to the brothers' truck, returned with pencil and paper, and began to write down the license number and a description of Buss's truck. Buss said to Ronald, "So you are holding me here against my will." Raymond laughed and said, "No, that's not what he said. That's what you'd like for him to say, but that's not what he said." Raymond believed that the microphone of Buss's radio was switched on.

Buss told Ronald that he had called the sheriff and Buss's superior officer. He told Ronald that his superior would not come through the mud on the brothers' property, and suggested that they move out to the road, but Ronald replied, "No way. We're not going out to the road." Buss asked Ronald what he would do if Buss drove out to the road and Ronald replied, "We'll have to see." Ronald had a loaded rifle in a sling on his shoulder, but neither of the brothers held their rifles in a threatening way during the conversation with Buss. Nor did they attempt to prevent Buss from leaving by standing in front of his truck.

Raymond wanted to go hunting. According to the district court, he "unloaded his rifle in an obvious fashion, dropping ammunition to the ground and then holding the rifle in the air for Buss to see." He got into the Hughes's truck and drove further onto the property, calling out to Ronald that he was going hunting. When he returned approximately twenty minutes later, he saw three or four police officers approaching the Buss truck.

One of the officers directed Ronald to put away his loaded rifle, which he was still carrying on his shoulder. Ronald initially refused, but then complied when the officer requested in a nice way that he do so. The entire group then drove to Troy Village Road nearby, arriving

at approximately the same time as DNR Warden Supervisor Leonard Cloutier, defendant-appellees Meyer and Combs, and another officer. Meyer and Combs obtained Buss's account of his encounter with the Hughes brothers. Meyer and Combs also talked to the officer who had arrived earlier and had asked Ronald to put away his rifle. On the basis of the statements they had received, and after referring to the applicable Wisconsin statutes, Meyer and Combs determined that they had probable cause to believe that Ronald had committed the crime of false imprisonment and that Raymond had aided and abetted his brother in the commission of that crime. The officers arrested the brothers and placed them in the Sauk County jail. After twenty-four hours Ronald and Raymond were released on bail. They remained under the conditions of bail until December 17, 1986, at which time the district attorney declined to prosecute them. The district court found that Buss neither recommended nor requested the brothers' arrest.

On appeal, Raymond Hughes contends that the district court erred in granting defendants' motion for summary judgment. He argues that a reasonable jury could find that the defendants did not have a good faith, reasonable belief that they had probable cause to arrest him, and that therefore a genuine issue of material fact exists precluding summary judgment. *See* Fed. R. Civ. P. 56(c).

However, what a jury could have found is not at issue in deciding a summary judgment motion on the issue of qualified immunity. This circuit has recently held that, even though pertinent facts may be in dispute, the question whether immunity attaches is always one for the judge to decide. *Jones v. City of Chicago*, 856 F.2d 985, 994 (7th Cir. 1988); *Rakovich v. Wade*, 850 F.2d 1180, 1201-02 (7th Cir.) (en banc), *cert. denied*, 109 S. Ct. 497 (1988). We apply the "clearly erroneous" standard of review to the district court's determination that " 'a reasonable police officer in like circumstances [c]ould have acted as the defendants did.' " *Jones*, 856 F.2d at 995 (quoting *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir. 1988)).

Probable cause for an arrest exists if, at the moment the arrest was made, the facts and circumstances within the officers' knowledge and of which they had reasonably trustworthy information were sufficient to warrant a prudent person in believing that an offense has been committed. *Beck v. Ohio*, 379 U.S. 89, 91 (1964). Probable cause is to be determined in a "practical, nontechnical" manner, *id.* (quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949)). The inquiry into the existence of probable cause raises questions of "probabilities . . . the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act." *Brinegar*, 338 U.S. at 175; *see also United States v. Watson*, 587 F.2d 365, 368 (7th Cir. 1978), *cert. denied*, 437 U.S. 1132 (1979). Probable cause requires more than bare suspicion, but need not be based on evidence sufficient to support a conviction, nor even a showing that the officer's belief is more likely true than false. *Brinegar*, 338 U.S. at 175, 176; *United States v. McDonald*, 723 F.2d 1288, 1295 (7th Cir. 1983), *cert. denied*, 466 U.S. 977 (1984). The Court recognized in *Brinegar* the ambiguity of situations with which the police are often confronted, and consequently noted that the rule of probable cause permits mistakes reasonably made. 338 U.S. at 176.

But even in the absence of probable cause for an arrest, qualified immunity provides officers with an additional layer of protection against civil liability. *See Anderson v. Creighton*, 107 S. Ct. 3034, 3041 (1987) (fourth amendment violation, although by definition unreasonable, does not foreclose additional reasonableness inquiry for purposes of qualified immunity); *id.* at 3049 (Stevens, J., dissenting) (majority's holding provides two layers of insulation from liability); *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1347-48, 1348 n.15 (7th Cir. 1985) (opinion of Coffey, J.) (distinction exists between standard used in determining existence of probable cause and less stringent standard used in determining officer's reasonable belief as to validity of probable cause).

Police officers are generally protected by qualified immunity if their allegedly unlawful actions meet the test of " 'objective legal reasonableness' . . . assessed in the light of the legal rules that were 'clearly established' at the time" the actions were taken. *Anderson*, 107 S. Ct. at 3038 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 819 (1982)); *see also Klein v. Ryan*, 847 F.2d at 372. Although the right of freedom from arrest without probable cause is beyond a doubt clearly established, more is required: *Anderson* mandates an inquiry into the facts surrounding the officer's action in order to determine whether "in the light of preexisting law the unlawfulness [was] apparent." 107 S. Ct. at 3039; *see also Klein*, 847 F.2d at 372.

Appellant has cited no authority, and our research has disclosed none, clearly establishing the unreasonableness of an arrest in circumstances analogous or similar to those confronting Meyer and Combs. *See Rakovich*, 850 F.2d at 1212. Nor do we believe that such a finding of unreasonableness would be warranted in light of the facts and controlling law. The crime of false imprisonment is defined in Wis. Stat. § 940.30: "Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class E felony." The restraint element of false imprisonment may consist of threats of force, or of conduct causing the plaintiff to feel a reasonable apprehension that force may be used, even if not expressly threatened. W. P. Keeton, D. B. Dobbs, R. E. Keeton, D. G. Owen, *Prosser and Keeton on Torts* § 11 at 49 (5th ed. 1984). Ronald's statement, "we'll have to see" when Buss asked what would happen if Buss attempted to drive away, accompanied by Ronald's possession of a loaded rifle, could reasonably have led the officers to believe that the foregoing definition of restraint had been satisfied. More central to this appeal, however, is whether Raymond could reasonably have been suspected of aiding and abetting his brother's acts.

Criminal liability for aiding and abetting is established by Wis. Stat. Ann. § 939.05(1), (2)(b). The elements of aiding and abetting are (1) conduct, either verbal or overt, which as a matter of objective fact aids another person in executing a crime; and (2) intent that the conduct will provide such assistance. *State v. Ivy*, 119 Wis.2d 591, 598, 350 N.W.2d 622, 626 (1984).

The information Buss provided to Meyer and Combs warranted a belief that Raymond was cooperating with his brother. He did whatever his brother requested, and Buss's statement to the officers that either Ronald or Raymond blamed DNR personnel for the death of their father could have provided some additional evidence supporting the existence of probable cause. True, Raymond's acts of calling the sheriff and writing down information about the Buss truck would not be criminal in themselves. However, under Wisconsin law, intent to aid and abet may be inferred from conduct, and the mere intent to assist, if it becomes necessary, may be sufficient. *State v. Cydzik*, 60 Wis.2d 683, 697, 698, 211 N.W.2d 421, 429, 430 (1973); *see State v. Sharlow*, 110 Wis.2d 226, 239 n.11, 327 N.W.2d 692, 699 n.11 (1983) (quoting the legislative history to § 930.05). Thus, a defendant need not commit an act constituting an element of the underlying crime in order to aid and abet the crime, *State v. Marshall*, 92 Wis.2d 101, 122, 284 N.W.2d 592, 601 (1979), and circumstantial evidence may be used to establish criminal liability. *See Frankovis v. State*, 94 Wis.2d 141, 150, 287 N.W. 2d 791, 795 (1980). Appellant's acts could reasonably, although perhaps mistakenly, be viewed as intentionally assisting Ronald in his alleged plan to hold Buss until the sheriff arrived. Qualified immunity is designed to shield from civil liability "all but the plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341 (1986). Meyer's and Combs's actions did not obviously violate that standard, and accordingly we find that the district court's conclusion of qualified immunity is not clearly erroneous.

We turn next to appellant's federal claim against Buss. Hughes claims that Buss violated his fourth amendment right to freedom from unreasonable seizure by providing Officers Meyer and Combs with false information concerning the confrontation between Buss and the Hughes brothers. Buss essentially contends that his statements to the officers cannot subject him to liability under § 1983 because they were not made in his capacity as a state official. Rather, he contends, his statements to the police were the equivalent to those a private citizen would make after calling for help and while reporting the details of an alleged crime. Inasmuch as private citizens are not normally suable under § 1983 for merely reporting a crime, neither should his statements subject him to potential liability, Buss argues. To this contention Hughes simply responds that Buss acted in his official capacity. While the parties' formulations approach the relevant legal principles, we find it necessary to define the issues somewhat more precisely. We must determine, not merely whether Buss acted as a state official or as a private citizen, but more specifically, whether he acted under color of state law, something which legal precedent tells us that private citizens, as well as state officials, are capable of doing. *E.g., Dennis v. Sparks,* 449 U.S. 24, 27-28 (1980).

Before Buss's conduct can be brought within the ambit of § 1983, it must have occurred under color of state law, as well as having deprived appellant of a federally-guaranteed right. *West v. Atkins,* 108 S. Ct. 2250, 2255 (1988). Not every action by a state official or employee is to be deemed as occurring "under color" of state law. Action is taken under color of state law when it is " 'made possible only because the wrongdoer is clothed with the authority of state law. . . .' " *Id.* (quoting *United States v. Classic,* 313 U.S. 299, 326 (1941)); *see also Lopez v. Vanderwater,* 620 F.2d 1229, 1236 (7th Cir. 1980) (state official cloaked with official power and purporting to act under color of official right acts under color of state law). Conversely, state officials or employees who act without

the cloth of state authority do not subject themselves to § 1983 suits. Thus, we have held that officers of the St. Louis Police Department (SLPD) assigned to a federal drug abuse agency did not act under color of state law by participating in a raid initiated by the federal agency, and which occurred outside of the SLPD's normal jurisdiction, even though one officer identified himself during the raid as a member of the SLPD. *Askew v. Bloemker*, 548 F.2d 673, 677 (7th Cir. 1976) ("mere assertion that one is a state officer does not . . . mean that one is acting under color of state law"). Similarly, we held that an assistant state's attorney who signed a petition to initiate a judicial inquiry into a person's mental condition did so as a private person, and therefore did not act under color of state law notwithstanding that he added his official title to his signature. *Byrne v. Kysar*, 347 F.2d 734, 736 (7th Cir. 1965), *cert. denied*, 383 U.S. 913 (1966). We have noted that "acts committed by a police officer even while on duty and in uniform are not under color of state law unless they are in some way "related to the performance of police duties." *Briscoe v. LaHue*, 663 F.2d 713, 721 n.4 (7th Cir. 1981), *aff'd*, 460 U.S. 325 (1983). A case somewhat analogous to this one is *Norton v. Liddel*, 620 F.2d 1375 (10th Cir. 1980), in which the court found that a sheriff's actions in providing facts upon which a criminal information was based were essentially those of a private citizen and thus were not performed under color of state law. *Id.* at 1381-82.

The facts of this case would appear to more strongly compel a conclusion that Buss did not act under color of state law than did the facts in *Norton*. While true that Buss is a law enforcement officer, his authority presumably does not extend to the general enforcement of state law; he is a game warden, charged only with enforcing the state's game laws, not the full panoply of criminal laws such as those against false imprisonment. In any case, Buss's acts of describing his encounter with the Hughes brothers was functionally equivalent to that of

any private citizen reporting to the police the details of an alleged criminal act. His status as a DNR official did not clothe him with greater authority to make statements to the police about the occurrence than any other citizen would possess. Thus, we conclude that Buss did not act under color of state law by virtue of his employment by the DNR.

That does not quite end our "under color" inquiry, however. A private person may also incur § 1983 liability by engaging in joint action with state officials to deprive a person of a federally protected right. *Dennis*, 449 U.S. at 27-28; *Hudson v. Chicago Teachers Union Local No. 1*, 743 F.2d 1187, 1191 (7th Cir. 1984). But private parties are not state actors when they merely call on the law for assistance, even though they may not have grounds to do so; "[t]here must be a conspiracy, an agreement on a joint course of action in which the private party and the state have a common goal." *Gramenos v. Jewel Cos., Inc.*, 797 F.2d 432, 435 (7th Cir. 1986), *cert. denied*, 481 U.S. 1028 (1987). Hughes has not alleged a conspiracy or agreement between Buss and the arresting officers. In fact, his allegations regarding their respective liability are quite discrete: the officers assertedly lacked probable cause to make an arrest, while Buss allegedly gave them false information. Nor do the circumstances speak of conspiracy. The district court found, and appellant does not contest, that Buss did not make any recommendation or request that the brothers be arrested. Rather than manifesting any foreknowledge or planning with respect to the brothers' arrest, Buss and the officers to all appearances merely responded to an unforeseen incident.

Because we conclude that Officers Meyer and Combs are protected by qualified immunity, and that Buss did not act under color of state law, the decision of the district court granting summary judgment to all defendants is affirmed. As the federal claims were dismissed before trial, the pendent state claims were also properly dismissed in the absence of any independent basis for federal jurisdic-

tion. *Maguire v. Marquette Univ.*, 814 F.2d 1213, 1218 (7th Cir. 1987). Of course, our affirmance is without prejudice to any state law cause of action appellant may be entitled to lodge in the courts of Wisconsin.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

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UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604
July 27, 1989
Before
Hon. WILLIAM J. BAUER, Chief Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. J. SMITH HENLEY, Senior Circuit Judge*

RAYMOND J. HUGHES, JR., Plaintiff-Appellant	)	Appeal from the United States District Court for the Western District of Wisconsin
No. 88-2761 vs.	)	
	)	No. 87 C 864
DALE MEYER, JOHN BUSS and ROBERT COMBS, Defendants-Appellees	)	Barbara B. Crabb, Judge.

This cause was heard on the record from the United States District Court for the Western District of Wisconsin, _____ Division, and was argued by counsel.

On consideration whereof, IT IS ORDERED AND ADJUDGED by this Court that the judgment of the said District Court in this cause appealed from be, and the same is hereby, AFFIRMED, with costs, in accordance with the opinion of this Court filed this date.

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* The Honorable J. Smith Henley, Senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, sitting by designation.

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

CHICAGO, ILLINOIS 60604

January 10, 1990

Before

Hon. WILLIAM J. BAUER, Chief Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. J. SMITH HENLEY, Senior Circuit Judge*

RAYMOND J. HUGHES, JR., Plaintiff-Appellant,	) Appeal from the United States District Court for the Western District of Wisconsin
No. 88-2761 vs.	)
	) No. 87 C 864
DALE MEYER, JOHN BUSS and ROBERT COMBS, Defendants-Appellees	) Barbara B. Crabb, Judge.

ORDER

On consideration of the petition for rehearing filed in the above-entitled cause by counsel for the plaintiff-appellant, all of the judges on the original panel having voted to deny the same,

IT IS HEREBY ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* The Honorable J. Smith Henley, senior Circuit Judge of the United States Court of Appeals for the Eighth Circuit, is sitting by designation.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

RONALD RAY HUGHES and
RAYMOND J. HUGHES, JR.,

Plaintiffs, ORDER

vs. 87-C-864-C

JOHN BUSS, DALE MEYER,
and ROBERT COMBS,

Defendants.

This is a civil action for money damages in which plaintiffs allege that defendants caused them to be arrested without probable cause in violation of the Fourth Amendment and Fourteenth Amendments. The action is brought pursuant to 42 U.S.C. 1983 and jurisdiction is present under 28 U.S.C. 1331. Plaintiffs raise pendent state claims of false arrest and trespass. Now before the court is defendants' motion for summary judgment and defendants' motion to strike the name of David Flanagan from plaintiffs' list of proposed witnesses.

Based on the parties' proposed findings of fact and for purposes only of deciding this motion, I find that there is no genuine issue as to the following material facts.[1]

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[1]Plaintiffs have disputed a number of defendants' proposed findings, citing as support the same depositions used by defendants to support the contested findings. For the most part, plaintiffs take issue with the wording of defendants' proposed findings, but do not dispute the facts themselves. The resolution of this motion does not depend upon the exact words of the parties, which — not surprisingly — none of them remembers. For the most part, defendants have supported adequately their proposed findings, and I do not find that the word-

(continued...)

Undisputed Facts

Plaintiffs Ronald Ray and Raymond J. Hughes Jr. are adult American citizens. At all times material to this action, defendants Meyer and Combs were employed as deputy sheriffs in Sauk County, Wisconsin. Defendant John Buss was a conservation warden employed by the Department of Natural Resources of the State of Wisconsin.

Plaintiffs are the owners of 160 acres of vacant land located in Sauk County. Access to the tract is by a dirt road that leads onto the tract from Troy Village Road.

November 30, 1986, was the final day of the deer hunting season. On that day at approximately 2:15 p.m., plaintiffs entered upon their land for the purpose of hunting deer. When plaintiffs arrived at their land, they found that a chain that normally extended across the dirt road had been lowered. The chain had been in place when they left the property the previous evening. The road was very muddy and there were deeply grooved truck tracks in the road.

Because the road was so muddy, plaintiffs drove only a short distance onto their land. They got out of their truck with their rifles in slings over their shoulders. After walking a short distance, plaintiffs observed at truck moving on their property. The truck was approximately 800 yards away and moving in plaintiffs' direction. As it moved across the property, it went into the hay fields. There were no official markings on the truck. Defendant Buss and his wife, Victoria Buss, were the occupants of the truck. There were two untagged deer in the back of Buss's truck

Victory Buss was not a DNR employee. She had been deer hunting before defendant Buss picked her up. She had not gotten her deer for that season.

The truck had difficulty climbing a grade on the muddy

1(...continued)
ing of the proposed findings misrepresents the record. Plaintiffs' attempts to find a genuine issue of material fact amount to disagreements over nuances. While I recognize that all inferences from the facts must be construed in favor of the non-moving party, the nuances disputed by plaintiffs are not material to the resolution of this motion.

road. It went off the road by as much as twenty feet so that it could proceed. Ronald Hughes signalled with his hand at the truck. Ronald Hughes asked the occupants of the truck why they were on his land and accused them of trespassing. Buss stated that he was a state game warden and was investigating complaints of illegal hunting. Ronald Hughes asked who had reported illegal hunting. Buss refused to provide him that information.

Ronald Hughes asked to see identification, and Buss displayed twice what appeared to Ronald to be a badge in a leather wallet. Ronald was not able to see it clearly enough to note the badge number. Buss pulled the badge away from Ronald without letting him see it. Besides the badge, Ronald observed radio equipment and a shotgun inside the truck. He knew at that point that Buss was a law enforcement official of some kind.[2] On first contact with Buss, plaintiffs did not observe any insignia on his clothes.

Ronald was infuriated because he believed that Buss was trespassing. Ronald was aggressive in his conversation, boisterous, loud, and upset in his behavior.[3]

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[2]Plaintiffs dispute that Ronald knew when he first approached the truck that Buss was a law enforcement official of some kind. Defendant Buss's proposed finding #11 states: "Ronald Hughes knew that John Buss was a law enforcement official of some kind when he first approached the Buss truck. It was at that point that he observed the badge as well as radio equipment and a shotgun which were inside the truck." Defendant Buss supports proposed finding #11 with a citation to Ronald Hughes' deposition. The lines cited by defendant Buss read in part as follows:

Q. [...] When did you first decide that you really had a law enforcement official of some kind who was driving on your land in the truck?

A. When I saw the badge, which I could not identify, and when I saw the radio equipment that he had inside his vehicle, and when I saw the uncased shotgun inside his vehicle, I figured he was a law enforcement official of some kind.

Plaintiffs may object to the phrase "when he first approached the Buss truck." However, this is a nuance that would appear to make little material difference to the facts proposed by either party.

[3]Defendant Buss's proposed finding #12 states that Ronald was "aggressive,

(continued...)

Shortly after his initial contact with Ronald, Buss placed radio calls for assistance to the Sauk County Sheriff's Department and to the Department of Natural Resources (DNR) office in Dodgeville. Ronald was aware that Buss made the calls.

Ronald wanted to call the Sauk County Sheriff's Department to have Buss arrested for trespassing. Ronald wanted Buss to stay on his property until the arrival of sheriff's deputies in order to have evidence of the trespass.

Ronald asked Raymond to use the radio in their truck to call the police. Raymond returned to the Hughes truck and placed a radio call. Ronald called Raymond back to the Buss truck, stating that he wanted Raymond to witness the fact that "this fella's getting belligerent with me." Raymond returned to the Buss truck. Ronald said to him: This guy is a real smart aleck and I want you to get down some of the things he said on paper." Raymond returned to the Hughes truck to get a pencil and paper, then walked back to the Buss truck and began writing down a description of the truck and its license number.

When Raymond returned to the Buss truck the second time, he heard Buss say: "You don't need to call Sauk County. I have already called them." At that point, Raymond assumed that Buss was a conservation warden. As Raymond began writing [down] the truck's license number, he heard Buss say: "So you are holding me here against my will." Raymond believed that the radio microphone in the Buss truck was switched on. He grabbed his stomach, laughed, and said: "No, that's not what he said. That's what you'd like for him to say, but that's not what he said."

Buss said to Ronald: "I have called the sheriff. I have called my superior officer. Now, I'm going to tell you one thing, Ron. My superior is not going to come down that

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[3](continued)
boisterous, loud and upset." Plaintiffs dispute this finding with citations to the depositions of Ronald and Raymond Hughes. The deposition of Raymond Hughes states that Ronald was "aggressive in his type of conversation."

muddy road. How about we go out to the road?" Ronald replied: "No way. We're not going out to the road." Buss said: What will you do if I drive out to the road?" Ronald replied: "We'll have to see." At the time he made this statement, Ronald still had a loaded rifle on his shoulder in a sling. At no time during plaintiffs' conversation with Buss did they hold their rifles in a threatening way. Plaintiffs did not stand in front of Buss's truck to prevent it from leaving.

After writing down information at his brother's request, Raymond got into the Hughes' truck and drove further onto the property. Before doing so, he unloaded his rifle in an obvious fashion, dropping ammunition to the ground and then holding the rifle in the air for Buss to see. As he was leaving, he called out to Ronald that he intended to do some hunting. Buss was aware that Raymond wanted to go hunting.

After being gone for approximately twenty minutes, Raymond returned to the area of the Buss truck. As he was driving across the property, he saw three or four officers converging on the Buss truck.

Upon Raymond's arrival at the truck, a Spring Green police officer, James Bloomer, directed Ronald to put away the loaded rifle he was carrying on his shoulder. Ronald refused. He indicated that he might put away his gun if he were requested to do so. The officer then asked Ronald in a very nice way to put away the weapon and Ronald did so. It was then agreed that the entire group would drive from the location of the Buss truck to Troy Village Road. John and Victoria Buss would drive together with the Spring Green officer and the DNR wardens who had arrived on the scene. Ronald and Raymond would ride in their truck.

At approximately 3:20 p.m., DNR Warden Supervisor Cloutier, defendant Meyer and Combs, and deputy Jernander arrived at the entrance to the Hughes property on Troy Village Road. At approximately the same time the two trucks from the Hughes property arrived on Troy Village Road.

Defendants Meyer and Combs interviewed defendant Buss, who gave a description of what had occurred on the Hughes property. Buss told defendants Meyer and Combs the following:

Buss had driven onto plaintiffs' land to investigate hunting complaints. The woman accompanying him was his wife. Plaintiffs had not allowed him to leave. Plaintiffs were armed with rifles when they stopped him.[4] Buss had identified himself to plaintiffs as a DNR warden. Upon hearing that Buss was a DNR warden, plaintiffs had become irate and hostile.[5] Either Ronald or Raymond had accused DNR personnel of contributing to the death of their father.[6] Ronald had talked about his ill will for the DNR. Ronald had given Raymond directions to take notes regarding the incident, including the license number of Buss's truck. Ronald had also instructed Raymond to make a telephone call to the Sauk County Sheriff Department. Raymond had done everything that Ronald directed him to do.[7] Ronald and Raymond had appeared to cooperate with each other. Ronald had wanted to report Buss to Buss's superior and Buss had offered to meet with his superior if those present would move

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[4]Plaintiffs dispute that there is any support for the finding that Buss told Meyer and Combs that plaintiffs "stopped" him. On p. 10 of his deposition Combs stated "He [i.e. Buss] said he was stopped. . . ."

[5]Plaintiffs dispute that Buss told Meyer and Combs that plaintiffs were "irate" and "hostile." In his deposition at p. 26–27, Meyer stated that Buss told him and Combs that plaintiffs became "irritable," and that Ronald especially became "hostile." At p. 15 of his disposition, Combs stated that Buss told him and Meyer that Raymond had appeared "generally irrate" [sic], as had Ronald.

[6]It is unclear whether Buss said that Ronald and Raymond, or one or the other, made statements regarding their father.

[7]Plaintiffs dispute that Buss told Meyer and Combs that Raymond did everything Ronald told him to do. At p. 15 of his deposition, Combs stated that Buss told him and Meyer that "Raymond was doing everything that his brother told him to do." Neither Buss nor Meyer testified in their dispositions that Buss made such a statement. However, this does not put into dispute that Buss did make the statement.

to Troy Village Road. Ronald had told Buss that Buss was not free to leave plaintiffs' land.[8] Buss had asked Ronald: "Well, what if I try?" Ronald had replied: "I'd like to see you try," or words to that effect.[9] Buss had felt fearful for his life. He had feared plaintiffs might shoot. Ronald or Raymond had stood in front of his truck.

Raymond was not present during the conversation about what would happen if Buss moved to Troy Village Road.

After hearing the accounts of defendant Buss and Spring Green police officer James Bloomer, defendants Meyer and Combs conferred privately about the course of action they should take. After referring to the Wisconsin statute that defines the crime of false imprisonment, defendants Meyer and Combs agreed that there was probable cause to believe that plaintiffs had committed that crime. They made the decision to arrest plaintiffs. Plaintiffs were arrested and spent the next twenty-four hours in the Sauk County jail, after which they were released on bail.

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[8]Plaintiffs contend that there is a genuine issue of fact as to what Buss said that Ron said about Buss's freedom to leave the property. At p. 11 of his disposition, defendant Combs stated that Buss told him and Meyer that Ronald said: "No, you are not leaving, we want the Sheriff's Department, you are staying here until they get here. . . ." At p. 27 of his deposition, defendant Meyer stated that Buss told him and Combs that Ronald had told Buss that Ronald would not allow him to leave. I do not find that these accounts differ materially. Both indicate that Buss told Meyer and Combs that Ron made statements to the effect that he did not want Buss to leave the property, and that the statements were crouched in language stronger than a request or a wish that Buss not leave the property.

[9]Plaintiffs contend that there is a genuine issue as to what Buss told Meyer and Combs that Ronald said when Buss asked him what would happen if he tried to leave. The parties have given several accounts of Ronald's response: "Go ahead and try it"; "Try it and we will see"; "You better not leave"; "We will see." Defendants Meyer and Combs state expressly in their proposed finding of fact that Buss said that Ronald said "I'd like to see you try" or "words to that effect." Once again, the versions of the conversation between defendant Buss and Ronald Hughes are not substantially different. Defendants Meyer and Combs have not mischaracterized Buss's account.

Defendant Buss did not request or recommend that plaintiffs be arrested.[10]

Opinion

Defendants Meyer and Combs

Plaintiffs contend that defendants Meyer and Combs acted without probable cause in arresting them and charging them with false imprisonment and acting as a party to a crime. Defendants contend that they are entitled to qualified immunity for their decision to arrest plaintiffs. Defendant Buss argues that defendants Meyer and Combs had probable cause to arrest plaintiffs.

When an action is brought under 42 U.S.C. 1983 challenging the validity of an arrest, the question is not whether probable cause existed, but rather whether the arresting officer believed in good faith that probable cause existed, and whether this belief was reasonable. Lenard v. Argento, 699 F.2d 874, 884 (7th Cir. 1983). An officer's belief is reasonable if a reasonable officer could have believed that probable cause existed in light of clearly established law and the information in the officer's possession. Anderson v. Creighton, ___ U.S. ___, 107 S. Ct. 3034, 3040 (1987).[11] The question of qualified, or good faith, immunity can be resolved on a motion for summary judgment. Id.; Mark v. Furay, 869 F.2d 1266, 1271 (7th Cir. 1985).

Although the proper question is whether defendants Meyer and Combs reasonably believed that there was probable cause to arrest plaintiffs, it is difficult to answer that question without understanding what constitutes probable cause. Determining whether there is probable cause for arrest involves "factual and practical considerations of everyday life on which reasonable and prudent men, not legal

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[10]Plaintiffs dispute this finding and contend that defendant Buss played a central role in plaintiffs' arrest. However, they do not put into dispute the finding that defendant Buss did not suggest or recommend that they be arrested.

[11]The Court has not defined "reasonable officer."

technicians, act." Brinegar v. United States, 338 U.S. 160, 175 (1949). Probable cause exists if the facts available to the officer at the moment of the arrest would "warrant a man of reasonable caution in the belief" that an offense has been committed. Beck v. Ohio, 379 U.S. 89, 96 (1964) (quoting Carroll v. United States, 267 U.S. 132, 162 (1925)).

In this case, defendants Meyer and Combs determined that the offense of false imprisonment had been committed by both plaintiffs: according to defendant Buss's account, although Ronald Hughes had been particularly upset and had done most of the talking, Raymond had appeared to act in cooperation with Ronald. Thus, defendants Meyer and Combs determined that Raymond acted as a party to the crime. False imprisonment is defined in Wis. Stat. 940.30 as follows: "Whoever intentionally confines or restrains another without the person's consent and with knowledge that he or she has no lawful authority to do so is guilty of a Class E. felony." See also Dupler v. Seubert, 69 Wis. 2d 373, 380, 230 N.W.2d 626 (1975) (defining the tort of false imprisonment). Someone is a party to a crime if he or she "intentionally aids and abets the commission of it. . . ." Wis. Stat. 939.05(2)(b). See also State v. Hecht, 116 Wis. 2d 605, 620, 342 N.W.2d 721 (1984).

Another law enforcement officer, defendant Buss, told defendants Meyer and Combs that he had encountered plaintiffs on their property while he was investigating complaints of hunting violation; that Buss had identified himself as a DNR warden; that plaintiff Ronald Hughes, in particular, appeared upset and hostile and spoke of his ill will for the DNR; that one or both Hughes brothers accused DNR personnel of contributing to the death of their father; that both plaintiffs carried rifles; that Ronald Hughes accused Buss of trespassing; that Ronald directed Raymond to call the Sauk County sheriff and to take notes on the incident; that Raymond appeared to carry out Ronald's instructions; that when Buss suggested they move to Troy Village Road, Ronald indicated that he did not want Buss to leave; that

when Buss had asked what would happen if he tried to leave, Ronald had replied "I'd like to see you try" or words to that effect; and that Buss was fearful for his safety.[12]

It was not unreasonable for defendants Meyer and Combs to rely on the report of a fellow law enforcement officer. Neither Meyer nor Combs had any reason to believe that defendant Buss was motivated by personal animus toward plaintiffs or that he was attempting to cover up his own illegal conduct.[13] Given defendant Buss's account of the incident, a reasonable police officer could have concluded that plaintiffs intended to keep Buss on their property until Buss's superior and the Sauk County officers arrived. It may be unusual to restrain a person against his or her will knowing that law enforcement officers will arrive shortly. A court might find that this fact argues against the existence of probable cause. But the standard against which defendants Meyer's and Combs's conduct must be measured does not require me to find probable cause. It requires only that a reasonable officer could have believed that there was probable cause. See Malley v. Briggs, 475 U.S. 335, 341 (1986) ("if officers of reasonable competence could disagree [on existence of probable cause to issue an arrest warrant], immunity should

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[12]Plaintiffs argue that defendant Buss's impression of his encounter with plaintiffs is irrelevant, since the victim's impression is not an element of the crime of false imprisonment. A person can be guilty of false imprisonment through acts or words or both. See Wisconsin Jury Instructions — Criminal §1275 at 2. If, as here, the alleged imprisonment was achieved through words rather than through physical force, it would be difficult to assess the intent of the words apart from the impression of the person to whom they were directed. Only that person has observed the demeanor and the immediate context of the allegedly threatening words first-hand. However, proof of false imprisonment does not rest so much on the individual plaintiff's subjective impression as on the determination that a person could reasonably have believed that he or she was not at liberty to leave. Even under this more objective standard, defendant Buss's own impression is not irrelevant.

[13]Plaintiffs attempt to suggest that defendant Buss was engaged in illegal hunting on their property, but they have submitted no facts that contradict defendant Buss's explanation for his presence.

be recognized") (emphasis added). Measured against this standard, defendants' conduct was not unreasonable. Accordingly, I will grant defendants Meyer's and Combs's motion.[14]

Defendant Buss

Plaintiffs contend that defendant Buss is liable for their false arrest because he gave an inaccurate and untruthful account of what had happened to defendants Meyer and Combs.

In tort law, giving false information that leads to an arrest is not generally a ground for liability. Testa v. Winquist 451 F. Supp. 388, 395 (D.R.I. 1978) (noting that under Rhode Island law, a private individual is liable only for knowingly giving false information to the police). To extend liability to a good faith private informer who provides false information would interfere with society's interest in efficient law enforcement. Id. The principles of tort law reflected in the tort claim of false arrest carry over to actions brought under 42 U.S.C. 1983. Mere negligence is insufficient to establish liability under 1983. Daniels v. Williams, 474 U.S. 327 (1986). In order to extend liability to defendant Buss, plaintiffs would have to show at trial that defendant Buss's account to defendants Meyer and Combs of his encounter with plaintiffs differed materially from what actually happened, and that defendant Buss intentionally provided a false account. At this stage in the proceedings, plaintiffs must show that a reasonable jury could find for them on their claim against defendant Buss. "The mere existence of a scintilla of evidence in support of [plaintiffs'] position will be insufficient." Anderson v. Liberty Lobby, ___ U.S.____, 106 S.

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[14]Plaintiffs object to the affidavit of Madison Chief of Police David Couper, who avers that the conduct of defendants Meyer and Combs was reasonable. I have not taken Chief Couper's affidavit into consideration because I find that the same conclusion can be reached on the basis of the facts submitted.

Ct. 2505. 2512 (1986).[15]

Plaintiffs summarize the discrepancies between defendant Buss's account to defendants Meyer and Combs and the actual events as follows: Buss did not tell Meyer and Combs that Raymond unloaded his rifle before he drove further onto the property; he did not tell them that Raymond drove away and that Raymond was not present when Ronald told Buss we would "have to see" what would happen if he tried to leave. According to plaintiffs, defendant Buss told Meyer and Combs that plaintiffs stood in front of his truck which plaintiffs contend is untrue. Plaintiffs aver that they did not hold their rifles in a threatening way, such that a reasonable person would fear for his or her safety.[16] Plaintiffs assert also that Raymond did not refuse to unload his rifle.[17]

Although there are some discrepancies between defendant Buss's account of the incident and what plaintiffs assert actually happened, they are not so egregious as to amount to an intentional, malicious, or even reckless falsification. Defendant Buss may have slanted the story he told to defendants Meyer and Combs. But plaintiffs have not contested the findings of fact that plaintiff Ronald Hughes appeared upset and even hostile during the encounter with defendant Buss; that both plaintiffs were carrying loaded rifles; that Ronald made it known to defendant Buss that he did not want Buss to leave his property; that Raymond carried out Ronald's instructions regarding calling the Sauk County Sheriff's office and noting the license number of Buss's truck; and that Ronald replied to Buss's question about what would

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[15]Plaintiffs must make this showing because, even though defendants are the moving parties, plaintiffs would have the burden of proof at trial. Celotex Corp. v. Catrett, ___ U.S. ___, 106 S. Ct. 2548, 2552–2553 (1986).

[16]However, it does not appear that defendant Buss told defendants Meyer and Combs that plaintiffs did hold their rifles in a threatening way.

[17]This is a puzzling assertion, since it was apparently Ronald who refused to unload his rifle when first told to do so by Officer James Bloomer. Nothing in the proposed findings states that Buss told Meyer and Combs that Raymond refused to unload his weapon.

happen if he tried to leave by saying "We'll have to see," or words to that effect. Plaintiffs have submitted nothing that would indicate that Buss had no reason to interpret their behaviour as threatening. Whether or not they intended to keep defendant Buss on their property against his will, the issue is whether defendant's story had any relation to the encounter as plaintiffs and defendants have described it in their proposed findings. I find that on the basis of plaintiffs' submissions, a reasonable jury could not find that defendant Buss provided defendants Meyer and Combs with a significantly altered, falsified account of his encounter with plaintiffs. Accordingly, I will grant defendant Buss's motion.

Because I am granting defendants' motion for summary judgment, it is not necessary for me to reach defendants' motion to strike David Flanagan from the plaintiffs' list of proposed witnesses.

Pendent State Claims

I decline to exercise pendent jurisdiction over plaintiffs' remaining state law claims. Where a federal claim is dismissed before trial, the district court should relinquish jurisdiction of any pendent state law claim unless there is some independent basis of federal jurisdiction, such as diversity of citizenship. Maguire v. Marquette University, 814 F.2d 1213, 1218 (7th Cir. 1987) (citing United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966); Blau Plumbing, Inc. v. S.O.S. Fix-It, Ind., 781 F.2d 604, 611-612 (7th Cir. 1986)). No such independent basis exists here.

Buss's motions for summary judgment are GRANTED. The Clerk of Court is directed to enter judgment for defendants, and dismiss this case.

Entered this 3rd day of August 1988.

BY THE COURT:

/s/
BARBARA B. CRABB
District Judge

a:Order

89- 1491

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1989

RAYMOND J. HUGHES, JR.,

Petitioner,

v.

JOHN BUSS,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

DONALD J. HANAWAY
Attorney General

DAVID T. FLANAGAN
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7971

TABLE OF CONTENTS

CASES CITED

OTHER AUTHORITIES

QUESTION PRESENTED

1. Does the agreement of the parties as to a question of fact which is an element of subject-matter jurisdiction preclude the Court of Appeals from examining the basis for jurisdiction?

No. _____

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SUPPLEMENTAL STATEMENT OF THE CASE

The respondent submits that the opinion of the court of appeals and the memorandum decision of the district court each offer a fair, succinct statement of the material facts which are not in

dispute, petitioner's appendix, pages A-1 to A-4 and A-15 to A-21, respectively.

As noted by the petitioner, the parties to this action did agree in pleadings that respondent conservation warden John Buss was acting under color of state law at all times material to the lawsuit.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS IS PROPERLY BASED UPON THE PRINCIPLE THAT A COURT MAY AT ANY TIME EXAMINE THE BASIS FOR SUBJECT-MATTER JURISDICTION.

The parties agreed at the outset of this action that warden John Buss was acting both within the scope of his employment as a warden and under color of state law at all times material to this action. This is a civil rights action brought pursuant to 42 U.S.C. § 1983. Acting under color of state law is an

element of subject-matter jurisdiction in such an action, Polk County v. Dodson, 454 U.S. 312, 315, 70 L.Ed. 2d 509, 102 S. Ct. 445 (1981); Ford v. Harris County Medical Society, 535 F.2d 321, 323 (5th Cir. 1976), cert. den. 429 U.S. 780, 97 S. Ct. 492, 50 L.Ed.2d 589; Sinclair v. Spatocco, 452 F.2d 1213 (9th Cir. 1972) (per curiam), cert. den. 409 U.S. 886, 93 S. Ct. 102, 34 L.Ed.2d 142 (1972).

A court may at any point inquire into the basis for subject-matter jurisdiction, American Fire & Casualty Co. v. Finn, 341 U.S. 6, 6-19, 72 S. Ct. 534, 541-43, 95 L.Ed. 702 (1950); Morris v. Gilmer, 129 U.S. 315, 325, 9 S. Ct. 289, 32 L.Ed. 690 (1889). The parties to litigation may not create by agreement subject-matter jurisdiction which does not otherwise exist, Mansfield, Coldwater & Lake Michigan R. Co. v. Swan, 111 U.S. 379, 382, 4 S. Ct. 501, 511, 28 L.Ed. 462 (1884). The court

of appeals, on its own motion examined one factual element of subject-matter jurisdiction, acting under color of state law, and determined there to be no basis for this action. It is certainly true that the defense made no attempt to contest that issue before the district court but that choice did not and could not preclude the court of appeals from inquiring into the basis for subject-matter jurisdiction.

II. THIS PETITION PRESENTS AN ISSUE WHICH IS ESSENTIALLY A FACTUAL DISPUTE.

County sheriff's deputies received calls both from the respondent and from the petitioner asking that they come the scene of a confrontation. When they arrived respondent Buss described to them what had happened before their arrival. The county officers then independently concluded that there was a basis to arrest the petitioner (district court order, A-21). The

petitioner has claimed that the account which Buss gave to the county officers was so incomplete and inaccurate as to permit the inference that Buss intended thereby to bring about a unjustified arrest. The district court concluded that the account given by Buss was not materially inaccurate (order A-25). The court of appeals determined that Buss, in providing his description of the county officers, was not acting under color of state law (decision, A-10). If the petitioner is suggesting that every action done by every state employe must necessarily be under color of state law, that is not a correct statement of the law, Polk County v. Dodson, supra. If the petitioner is suggesting that in this specific situation that which the respondent did was under color of state law, that argument is entirely based upon the unique facts of this particular situation and for that reason is not an

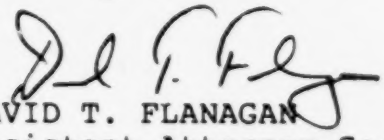
appropriate matter for consideration upon certiorari.

CONCLUSION

The respondent respectfully submits that the circuit court acted properly in raising and resolving a factual issue which was an element of subject-matter jurisdiction for this action.

Respectfully submitted,

DONALD J. HANAWAY
Attorney General



DAVID T. FLANAGAN
Assistant Attorney General

Attorneys for Respondent

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 266-7971

(3)

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JAMES E. DOYLE, JR.
214 W. Mifflin Street
Madison, WI 53703-2594
(608) 256-9031

Counsel for Petitioner

No. 89-1491

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES CITED

STATUTES CITED

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ARGUMENT

I. THE COLOR OF STATE LAW REQUIREMENT IS AN ELEMENT OF PETITIONER'S SUBSTANTIVE CLAIM, NOT A PREREQUISITE TO SUBJECT-MATTER JURISDICTION.

Respondent Buss seeks to excuse the Seventh Circuit's disregard of the pleadings in this case by stating that the color of state law requirement in sec. 1983 actions is an element of subject-matter jurisdiction, which can be

raised by a court at any time. Respondent's Brief in Opposition, pp. 2-4. Of course, the Court of Appeals did not hold that the color of state law requirement is an element of subject-matter jurisdiction. Appendix to Petition for Writ of Certiorari, pp. A-8 to A-11. Nor did the District Court make any ruling on the question of subject-matter jurisdiction. Appendix, pp. A-24 to A-26. This is a creative, albeit doomed, attempt to justify the decision of the Court of Appeals.

In a federal lawsuit for damages pursuant to 42 U.S.C. Sec. 1983, a plaintiff must prove that the defendant acted under color of state law. That is an element of a plaintiff's claim, and if it cannot be proven, the plaintiff cannot prevail. Color of state law, however, is not a requirement for the federal court's exercise of subject-matter jurisdiction.

Section 1983 actions may be heard in federal court pursuant to the court's federal question jurisdiction. 28 U.S.C. Sec. 1331. Tyler v. Mmes. Pasqua & Toloso, 748 F.2d 283, 285 (5th Cir. 1984). Whether federal question jurisdiction exists is determined from the face of plaintiff's complaint. Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 103 S.Ct. 1962, 1971-72, 76 L.Ed. 2d 81 (1983).

Long ago it was settled by this Court that "if the plaintiff really makes a substantial claim under an act of Congress, there is jurisdiction whether the claim ultimately be held good or bad." The Fair v. Kohler Die & Specialty Co., 228 U.S. 22, 25, 33 S.Ct. 410, 412, 57 L.E. 716 (1913); Bell v. Hood, 327 U.S. 678, 66 S.Ct. 773, 90 L.Ed. 939 (1946).

Petitioner in this case clearly made a substantial federal claim against respondent Buss. The complaint alleges that respondent was employed as a warden by the Wisconsin Department of Natural Resources and was acting under color of state law in his contact with petitioner and his brother. The complaint goes on to allege the basic facts of the incident which resulted in petitioner's arrest; those facts are detailed in the Petition for Writ of Certiorari of March 19, 1990. The complaint alleges for its federal claim that respondent and others "caused the plaintiffs to be arrested without probable cause . . . and subjected them to searches of their bodies and incarceration, thereby causing them to be subjected to a deprivation of their right to be free from such arrest and imprisonment." As has been pointed out before, respondent admitted that his actions were under color of state law.

If the merits of a plaintiff's claim were treated as elements of subject-matter jurisdiction, that would not only defeat the traditional exercise of federal question jurisdiction but it would also effectively deny the plaintiff's right to a jury trial on the merits of his claim. Not surprisingly, this has never been the law; nor should it become the law. Kulick v. Pocono Downs Racing Ass'n, Inc., 816 F.2d 895, 898 (3rd Cir. 1987) ("Otherwise the district court could turn an attack on the merits, against which the party has the procedural protections of a full trial including the right to a jury, into an attack on jurisdiction, which a court may resolve at any time without a jury . . . .").

The Court should realize that the respondent's interpretation of the Seventh Circuit's decision is at odds

with prior decisions of this Court, other circuits, and the Seventh Circuit itself. Kohler Die & Specialty, supra; Green v. Ferrell, 664 F.2d. 1292, 1294, (5th Cir. 1982); Junior Chamber of Commerce of Rochester v. U.S. Jaycees, 495 F.2d 883, 886 (10th Cir. 1974); Malak v. Assoc. Physicians, Inc., 784 F.2d 277, 279-80 (7th Cir. 1986).

Respondent cites three cases in support of his novel proposition. There is some question, however, in each of those cases whether the color of state law requirement was in fact being treated as a requisite for subject-matter jurisdiction.[1] The criticism of Wright and Miller is apt:

> In several recent cases dismissal has been for want of federal question jurisdiction in suits against private institutions for alleged denials of constitutional rights, where it was found that the institution was not so entwined with the state that its action could be regarded as "state action" to make the Constitution applicable . . . . But . . . it would seem that a non-frivolous claim that the institution has the requisite relation to the state is sufficient to establish jurisdiction. If that contention is found to be unsound,

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1 Those cases may have been referring to the color of law requirement in 28 U.S.C. Sec. 1343 (3), the jurisdictional statute for certain civil rights claims which could not meet the amount-in-controversy requirement of 28 U.S.C. Sec. 1331 prior to 1980.

> dismissal should be for failure to state a claim on which relief can be granted rather than for want of jurisdiction.

Wright, Miller and Cooper, Federal Practice and Procedure: Jurisdiction 2d, Sec. 3564 n.13 (citations omitted).

II. THE FACTUAL NATURE OF THE COLOR OF STATE LAW DETERMINATION UNDERLINES THE UNFAIRNESS OF THE COURT OF APPEALS DECISION.

Respondent seeks to diminish the importance of this case by arguing that it presents "essentially a factual dispute." Respondent is partially correct.

The color of state law issue is one which turns on matter of fact. Because this is true, it underscores the unfairness of the Court of Appeals decision. What the Court of Appeals did, after all, was to decide an essentially factual matter, without notice or opportunity to the parties to be heard, contrary to the way the issue had been settled by the pleadings. Not only that, but because the color of law issue had been settled by the pleadings, petitioner did not devote much energy to the issue in the discovery process. Petitioner would have been handicapped in responding to the issue for the first time on appeal even if he had had a chance to be heard.

CONCLUSION

For the reasons discussed above, petitioner respectfully requests that the Court grant the petition for certiorari.

Dated this _____ day of _____, 1990.

Respectfully submitted:

By:_____

James E. Doyle, Jr.
214 W. Mifflin Street
Madison, Wisconsin 53703
(608) 256-9031

Attorneys for Petitioner